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7

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 SENORX, INC.,
12 Plaintiff,
13 vs.
14 COUDERT BROTHERS, LLP; and
15 DOES 1-500, inclusive,
16 Defendants.
17
18
19
20 } CASE NO. C - 07-01075 SC
} **PLAINTIFF'S OPPPOSITION TO**
} **DEFENDANTS' MOTION TO**
} **TRANSFER VENUE**
} **PURSUANT TO 28 U.S.C. § 1412**
} Date: August 17, 2007
} Time: 10:00 a.m.
} Ctrm: 1
} Judge: Honorable Samuel Conti
} Complaint Filed: October 27, 2004
} **FILED CONCURRENTLY**
} **HEREWITH**
} DECLARATION OF GERALDINE
WEISS

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1412

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. BACKGROUND	2
A. FACTUAL BACKGROUND	2
B. PROCEDURAL BACKGROUND	3
III. LEGAL ARGUMENT	5
A. THIS ACTION MAY NOT BE TRANSFERRED UNDER SECTION 1412 BECAUSE SENORX'S CLAIMS AGAINST THE INDIVIDUAL PARTNER DEFENDANTS ARE NOT "CORE"	5
B. THE INTERESTS OF JUSTICE AND CONVENIENCE OF PARTIES AND WITNESSES WOULD NOT BE SERVED BY THE TRANSFER OF THIS ACTION TO NEW YORK	7
IV. CONCLUSION	13

INDEX OF AUTHORITIES

2 Cases

3. 1. *Donald v. Curry*, 328 B.R. 192 (2005)

4. 2. *Goldberg Holding Corp. v. NEP Productions, Inc.*,
93 B.R. 33

5. 3. *In re Commonwealth Oil Refining Co.*, 596 F.2d 1239, 1247
(7th Cir. 1979), cert. denied, 44 U.S. 1045 (1980)

6. 4. *In re Guild & Gallery Plus, Inc.*, 72 F.3d 1171, 1178
(3d Cir. 1996)

7. 5. *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 267
(3d Cir. 1991)

8. 6. *In re Windtech, Inc.*, 73 B.R. 448 (Bnkr. D. Conn. 1987)

9. 7. *Tultex Corp. v. Freeze Kids, L.L.C.*, 252 B.R. 32, 35-36
(S.D.N.Y. 2000)

10. 8. *Waire v. Baker*, 145 B.R. 267

11. **14 Statutes**

15. 1. 28 U.S.C. § 1412

16. 2. 28 U.S.C. section 157

17. 3. 44 Federal Rules of Bankruptcy Procedure Rule 1014(a)(1)

18. 4. California Corporations Code Section 16956

1
2
3
4 **I. INTRODUCTION**

5 Defendant Coudert Brothers LLP and Defendants Charles E. Aster, Steven H.
 6 Becker, Philippe Bennett, Pamela T. Church, Charles H. Critchlow, Edmund S. Cohen,
 7 Jeffrey E. Cohen, James C. Colihan, William K. Coulter, Richard N. Dean, Richard
 8 De Palma, Robert L. Eisen, Joseph Farrell, Kay Georgi, Tara K. Giunta, Kevin W.
 9 Goering, Deborah Goldstein, Michael J. Hagan, Robert E. Hanlon, Gerard V. Hannon,
 10 Andrew Hedden, Janet Hernandez, Stephen M. Hudspeth, W. Michael Kelly, Frederick
 11 P. Konta, George J. Martin, Jr., Brian McGunigle, Barry Metzger, Owen Nee, Marilyn
 12 S. Okoshi, Richard M. Ornitz, Kenneth R. Page, Robert F. Pietrowski, Jr., Darrell
 13 Prescott, Clyde E. Rankin, III, Richard Reilly, Thomas Rice, Olga Sirodoeva, James
 14 B. Sitrick, Roger D. Stark, Edward H. Tillinghast, III, Charles H. Wagner, Roger B.
 15 Wagner, Christopher M. Wells, Anthony Williams, Mary F. Voce, John M. Gurley,
 16 and Carol B. Stubblefield ("Appearing Individual Partner Defendants") have moved
 17 for an Order under 28 U.S.C. § 1412 to transfer this matter to the United States
 18 District Court for the Southern District of New York, because this is the district in
 19 which Coudert Brothers LLP's Chapter 11 Bankruptcy proceeding, entitled In re
 20 Coudert Brothers LLP, Case No.06-12226, is currently pending.

21 Plaintiff SenoRx, Inc. ("SenoRx") opposes transfer on the grounds that the
 22 interests of justice and the convenience of both parties and witnesses will not be served
 23 by transfer of this action to New York:

24 1. This is a legal malpractice case involving a California medical device
 25 manufacturer plaintiff, California lawyer defendants, and California witnesses, based
 26 on events that occurred in California, that will utilize California law and it should be
 27

1 tried in California and not in the Southern District of New York. See, Declaration of
2 Geraldine Weiss (“Weiss Dec.”) served and filed herewith.

3 ||| / / /

4

5 2. A determination of California Corporations Code section 16956's
6 applicability in the context of this case (admittedly one of first impression) should be
7 made in California and not in the Southern District of New York. See, The meaning
8 of California statutes, and potentially the intent of the California legislature, should be
9 determined in California, not in the Southern District of New York;

10 3. Only core proceedings may be transferred under 28 U.S.C. § 1412.
11 *Tultex Corp. v. Freeze Kids, L.L.C.*, 252 B.R. 32, 35-36 (S.D.N.Y. 2000). SenoRx's
12 legal malpractice claims and guarantor claims against the Individual Partner
13 Defendants' are not core proceedings and, thus, transfer on the basis of Section 1412
14 is inappropriate. See, Order Denying Plaintiff's Motion to Remand at p. 3:24-25, Ex.
15 "5" to Weiss Dec.;

16 4. Filing of a Proof of Claim in the Bankruptcy Court chosen by Coudert
17 Brothers LLP by SenoRx does not constitute a consent to jurisdiction or venue in the
18 Southern District of New York; and

19 6. SenoRx does not agree that there can be no finding of liability against
20 Individual Partner Defendants until a finding of liability, a determination of damages,
21 and especially a finding that Coudert Brothers LLP cannot satisfy the self insured
22 retention has been made. Some Individual Partner Defendants (who are California
23 residents) may be independently and directly liable. If so, their liability for damages
24 is independent of Coudert's satisfaction of its self insured retention.

25 || Defendants' Motion to Transfer should be denied.

II. BACKGROUND

A. FACTUAL BACKGROUND

On October 27, 2004, Plaintiff SenoRx, Inc. commenced this action for legal malpractice in the Superior Court of the State of California for the County of San Francisco, captioned *SenoRx, Inc. vs. Coudert Brothers, LLP, and Does 1-500*, CGC 04435849. The causes of action contained in the Complaint are based solely upon events that occurred in California. Each and every cause of action contained in this legal malpractice action is based upon California law.

8 The legal malpractice action arises from Coudert Brothers LLP's failure to
9 timely render legal services relating to the filing of patent applications for SenoRx.
10 Specifically, the San Francisco office of Coudert Brothers LLP was retained by
11 SenoRx in 2001 to file patent applications for medical equipment. SenoRx claims it
12 was damaged when three foreign patent applications were not timely filed by Coudert
13 Brothers and the attorneys and other employees based in its San Francisco office. The
14 relevant patents are PCT/US/01/4303, PCT/US/01/49295 and PCT/US/01/48233.
15 These patents could not be revived in the Japanese market. SenoRx sustained millions
16 of dollars in damages.

B. PROCEDURAL BACKGROUND

18 On October 26, 2005, on November 3, 2005, and on January 25, 2006, SenoRx
19 filed Doe amendments with respect to the Complaint for purposes of substituting
20 specifically named individual defendants for fictitiously named defendants. On those
21 dates, SenoRx named Doe defendants, including the Individual Partner Defendants.
22 ***Thirty two are former limited liability partners of Coudert Brothers, LLP. who are***
23 ***California residents and who did, or may have, rendered services to SenoRx. The***
24 ***remainder, Appearng Individual Partner Defendants, are former limited liability***
25 ***partners of Coudert Brothers LLP, none of whom are California residents and may not***
26 ***have rendered any services to SenoRx.***

1 On September 22, 2006, Coudert Brothers LLP filed a Chapter 11 Bankruptcy
 2 Petition, in the United States Bankruptcy Court for the Southern District of New York
 3 entitled In re Coudert Brothers LLP, Case No. 06-12226. Accordingly, at the time this
 4 matter was automatically stayed as to Coudert Brothers LLP pursuant to 11U.S.C. §
 5 362(a). The stay as to Coudert Brothers LLP remains in effect.
 6

7 Thereafter, SenoRx filed a Fourth Amended Complaint on November 8, 2006.
 8 The *Appearing* Individual Partner Defendants, none of whom are California residents,
 9 demurred to the Fourth Amended Complaint.¹ On January 23, 2007, the San Francisco
 10 Superior Court overruled the *Appearing* Individual Partner Defendants' demurrer to
 11 the Fourth Amended Complaint because the court would need to consider facts outside
 12 of the 4-corners of the Fourth Amended Complaint (which would be a task beyond the
 13

15 ¹Service by mail was attempted on all individual defendants who were partners
 16 at Coudert Brothers LLP. Such out of state defendants appeared and demurred
 17 based on their claimed status as limited liability partners. None of the California
 18 Defendants accepted service by mail nor have they yet appeared in this action.
 19 While the demurrer was pending, no further expense was incurred by SenoRx in
 20 personally serving California defendants (all Coudert partners) who would raise the
 21 same issue, because the state court's ruling on the out of state *Appearing* Individual
 22 Partner Defendants' demurrer would be binding on individual California partner
 23 defendants. The expense of personally serving several dozen individual defendants
 24 was deferred until the court's final ruling. Once that occurred this case was
 25 removed to Federal Court. See, Weiss Dec. ¶¶ 7, 8.
 26
 27

1 scope of a demurrer) in order to determine California Corporations Code § 16956's
 2 applicability in the context of this case which the court noted was more appropriate in
 3 a summary judgment motion and accordingly invited such a motion.
 4

5 On January 31, 2007, SenoRx filed a proof of claim in the Coudert Brothers
 6 LLP bankruptcy case seeking the same recovery as the claim set forth in the Fourth
 7 Amended Complaint against Coudert Brothers LLP.
 8

9 On February 21, 2007, the Appearing Individual Partner Defendants removed
 10 pursuant to the provisions of 28 U.S.C. Sections 1452 and 1334 and Bankruptcy Rule
 11 9027.
 12

13 Although SenoRx thereafter sought to have this matter remanded back to state
 14 court, this Court issued an Order on May 24, 2007, denying SenoRx's motion to
 15 remand.
 16

17 This Motion to Transfer Venue brought *solely* under 28 U.S.C. §1412 was
 18 thereafter filed by Coudert Brothers LLP and the Appearing Individual Partner
 19 Defendants.
 20

21 III. LEGAL ARGUMENT

22 A. THIS ACTION MAY NOT BE TRANSFERRED UNDER 23 SECTION 1412 BECAUSE SENORX'S CLAIMS AGAINST 24 THE INDIVIDUAL PARTNER DEFENDANTS ARE NOT "CORE"

25 "A district court may transfer a case or proceeding under title 11 to a
 26 district court for another district, in the interest of justice or for the
 27 convenience of the parties." 28 U.S.C. § 1412.
 28

1 The factors employed by courts in determining whether a transfer of venue is
 2 appropriate are set forth in *Puerto Rico v. Commonwealth Oil Refining Co.* and are:
 3 (1) the proximity of all creditors to the court; (2) the proximity of the debtor to the
 4 court; (3) the proximity of witnesses necessary to administer the estate; (4) the location
 5 of the assets; (5) the economic administration of the estate; and (6) the necessity for
 6 ancillary administration in the event of liquidation. *In re Commonwealth Oil Refining*
 7 *Co.*, 596 F.2d 1239, 1247 (7th Cir. 1979), *cert. denied*, 44 U.S. 1045 (1980).

8 44 Federal Rules of Bankruptcy Procedure Rule 1014(a)(1) states:
 9 “If a petition is filed in a proper district, on timely motion of a party in
 10 interest, and after hearing on notice to the petitioners, the United States
 11 trustee, and other entities as directed by the court, the case may be
 12 transferred to any other district if the court determines that the transfer is
 13 in the interest of justice or for the convenience of the parties.”

14 The party seeking a change of venue has the burden of proof, which must be
 15 carried by a preponderance of the evidence. *In re Commonwealth Oil Refining*, 596
 16 F.2d 1293 (5th Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

17 Only core proceedings may be transferred under 28 U.S.C. § 1412. *Tultex*
 18 *Corp. v. Freeze Kids, L.L.C.*, 252 B.R. 32, 35-36 (S.D.N.Y. 2000); *Goldberg Holding*
 19 *Corp. v. NEP Productions, Inc.*, 93 B.R. 33 (Section 1412 permitting district court to
 20 transfer case or proceeding under Bankruptcy Code to district court for another district
 21 in interest of justice or for convenience of parties *does not apply to action merely*
 22 *related to bankruptcy case*).

The present action is not a core proceeding. See, *Waire v. Baker*, 145 B.R. 267 (adversary proceeding brought by former client against bankrupt attorney for his alleged malpractice was noncore proceeding).

111

“[A] proceeding is core under [28 U.S.C.] section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.”” In re Guild & Gallery Plus, Inc., 72 F.3d 1171, 1178 (3d Cir. 1996) (quoting In re Marcus Hook Dev. Park, Inc., 943 F.2d 261, 267 (3d Cir. 1991)). “If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be related to the bankruptcy because of its potential effect, but under section 157(c)(1) it is an “otherwise related” or non-core proceeding.”” Id. (quoting In re Wood, 825 F.2d 90, 97 (5th Cir. 1987)).

This legal malpractice action does not involve any substantive rights provided by the Bankruptcy Code. Nor could any of SenoRx's claims arise only in a bankruptcy case. Indeed, this action was pending for two years before Defendant Coudert Brothers filed its bankruptcy petition. Clearly, this action is non-core. Thus, Defendants' Motion to Transfer Venue under Section 1412 must be denied, because it is not a core proceeding to which Section 1412 applies. See, e.g., *Tultex Corp. v. Freeze Kids, L.L.C.*, 252 B.R. 32, 35-36 (S.D.N.Y. 2000).

**B. THE INTERESTS OF JUSTICE AND CONVENIENCE OF PARTIES
AND WITNESSES WOULD NOT BE SERVED**

BY THE TRANSFER OF THIS ACTION TO NEW YORK

Under 28 U.S.C. Section 1412 of the Bankruptcy Code, a case or proceeding may be transferred "in the interest of justice or for the convenience of the parties." See, *Puerto Rico v. Commonwealth Oil Ref. Co. (In re Commonwealth Oil Ref. Co.)*, 596 F.2d 1239, 1247 (5th Cir. 1979) (court must consider, inter alia, proximity of creditors, debtor, witnesses, books, assets).

"The analysis of any combination of "interest of justice" and "convenience of parties" under § 1412 is inherently factual and necessarily entails the exercise of discretion based on the totality of the circumstances, *which may include considerations regarding witnesses and the presentation of evidence.*

“Thus, a typical laundry list of non-exclusive factors, which usually adds up to a totality-of-circumstances analysis, takes witnesses into account: (1) proximity of creditors to Court; (2) proximity of debtor to Court; (3) proximity of witnesses necessary to administration of estate; (4) location of assets; (5) economic and efficient administration of case; (6) need for further administration if liquidation ensues. See *Puerto Rico v. Commonwealth Oil Ref. Co.* (*In re Commonwealth Oil Ref. Co.*), 596 F.2d 1239, 1247 (5th Cir. 1979), cited with approval, *In re Enron Corp.*, 274 B.R. 327, 343-49 (Bankr. S.D.N.Y. 2002); 1 COLLIER P4.04[4][a][ii].

“Such factors, however, when distilled to their essence, reveal that they

1 are mere secondary tools facilitating the ultimate § 1412 analysis, which
 2 entails a balancing of due process concerns of assuring appropriate access
 3 to the court for all parties in interest against the economic and efficient
 4 administration of the case. *While it may be economically efficient for*
 5 *those in control of a bankruptcy case to administer it in a location that*
 6 *handicaps parties in interest, the integrity of the bankruptcy process*
 7 *requires that the natural enemies have reasonable access to the court.”*

8
 9 Donald v. Curry, 328 B.R. 192 (2005) (emphasis added).
 10

11 In this instance, those considerations support a California venue over a New
 12 York venue.
 13

14 This is a legal malpractice case involving a California medical device
 15 manufacturer plaintiff, California lawyer defendants, and California witnesses, based
 16 on events that occurred in California, that will utilize California law. See, Weiss Dec.
 17 It should be tried in California and not in the Southern District of New York.
 18

19 All of the events upon which this action is based took place in California.
 20

21 All of SenoRx's legal malpractice claims and guarantor claims are based solely
 22 on California state law.
 23

24 Additionally, this action involves a determination of California Corporations
 25 Code Section 16956's applicability in the context of this case (admittedly one of *first*
 26 *impression*) and should be made in California and not in the Southern District of New
 27 York. The meaning of California statutes, and potentially the intent of the California
 28 legislature, should be determined in California, not in the Southern District of New

1 York.

2 Numerous party and non-party witnesses, including but not necessarily limited
 3 to current and former employees of both SenoRx and Defendant Coudert Brothers
 4 LLP, are California residents. See, Weiss Dec. ¶¶1-5. The expense and inconvenience
 5 of transporting these witnesses to New York weighs heavily against a change of venue.
 6 *In re Windtech, Inc.*, 73 B.R. 448 (Bnkr. D. Conn. 1987) (considering expense and
 7 inconvenience of transporting essential witness to a distant location as one factor
 8 weighing against a change of venue).

9
 10 It is undisputed that SenoRx is a California corporation. SenoRx is based at 11
 11 Columbia, Suite A, Aliso Viejo, California 92656. **The SenoRx employees who had**
 12 **dealings with Coudert Brothers and who therefore would testify at trial are all**
 13 **based in California.** Weiss Dec. at ¶ 9.

14
 15 Coudert Brothers admits that all of the employees of Defendant Coudert
 16 Brothers LLP *who performed work for SenoRx on the three patents at issue in this*
 17 *action*, including both witnesses who are not named as defendants and those who are
 18 named as defendants, are California residents; these include Ruth Der, Tara Faenza,
 19 Jordan Wilson, Lorraine Carcamo and James Fox. **All are based in San Francisco**
 20 **or Palo Alto.** See, Defendant Coudert Brother's responses to Special interrogatories
 21 which identify the names and addresses of ex-Coudert employees who worked on the
 22 SenoRx file (See Responses No 1, 2 and 3.3), Ex. "3" to Weiss Dec. See, also, ex-
 23 cross defendant Duane Morris' responses to Form Interrogatories which identify the
 24 names and addresses of ex-Coudert employees who have knowledge of the SenoRx
 25
 26
 27

1 malpractice, again California based; these include Edward Lynch, Ruth Der, Tara
 2 Faenza and defendants Don Bartels and David Schnaff. **All are based in San**
 3 **Francisco or Palo Alto.** See Response No 12.1, Ex. "4" to Weiss Dec.
 4

5 ///

6 Additionally, Coudert ex-employee, San Francisco based Anne Marie Leavy,
 7 identifies the local, California-based employees who were responsible for Coudert
 8 foreign filings as San Francisco area based Tara Faenza (page 13, lines 10-17), who
 9 was supervised by defendant, San Francisco based Don Bartels (page 18, lines 15-16
 10 and page 83, lines 4-8). The interim managing partner to whom Ms. Leavy
 11 complained about Mr. Faenza's work was San Francisco based defendant Lillian
 12 Nakagawa (page 77, lines 13-24, page 78, lines 4-14 and page 96, lines 3-10). The
 13 managing partner at Coudert San Francisco was San Francisco area based Mr. Hebert
 14 (page 97, lines 20-21). The testimony of Ms. Leavy is crucial to this case as it shows
 15 that the Coudert employee in charge of the SenoRx foreign filings (in this legal
 16 malpractice case where the three foreign filings were missed) was incompetent and
 17 inadequately supervised. **Based upon information received from Coudert during**
 18 **discovery, these ex Coudert employees (some of whom are defendants) are all**
 19 **California based.** See, Deposition of Anne Maria Leavy, Ex. "1" to Weiss Dec.
 20

21 Also, San Francisco area based Ruth Der testified at her deposition that local,
 22 California based Don Bartels and David Schnaff were supervising attorneys for IP at
 23 Coudert Brothers (pages 17-18, lines 20-3). Defendant Don Bartels supervised
 24 international property for Northern California (page 19, lines 10-18). Defendant Mr.
 25

1 Hebert was the co-managing partner with defendant Mr. Michaelson. (Page 19, lines
 2 2-9). SenoRx was assigned to the San Francisco office (only). ALL of the files were
 3 kept there and various San Francisco Coudert employees worked on the SenoRx file -
 4 James Fox, Nita Miller, Anne Marie Leavy, Jordan Wilson and Tara Faenza - who was
 5 in charge of prosecuting the SenoRx foreign applications (page 20-21, lines 4-20). **All**
 6 **of these employees are California residents.** The testimony of Ms. Der is important
 7 as it illustrates who worked on the SenoRx files and also identifies which of the
 8 Coudert attorney defendants were involved in managing the San Francisco offices
 9 where the malpractice occurred. Deposition of Ruth Der, Ex. "2" to Weiss Dec.
 10

11 Finally, the testimony of Ms. Der regarding the location of SenoRx files (San
 12 Francisco) calls attention to another relevant factor - this is a document intensive case
 13 and the documents were kept in the San Francisco area by its former attorney Coudert
 14 Brothers ***and its current San Francisco based attorney, Duane Morris.***
 15

16 The only factor, besides the location of Defendant Coudert Brothers LLP's
 17 bankruptcy action, arguably weighing in favor of transfer to New York is the residence
 18 of the Appearing Individual Partner Defendants in various locations other than
 19 California. However, Appearing Individual Partner Defendants (who are not
 20 California residents) all claim that they rendered no services to SenoRx. Thus, their
 21 value as witnesses in this action is minimal. Additionally, there are numerous
 22 Individual Partner Defendants who are California residents who have not yet appeared
 23 in this action.
 24

25 It cannot be seriously argued that a New York Court can more effectively
 26
 27

1 administer this action when the legal malpractice occurred in California; all of the non-
2 party witnesses, the Plaintiff, and most of the defendants directly involved in the
3 malpractice are residents of California; most, and perhaps all, of the documents
4 relevant to a determination of this action are maintained in California; and California
5 law controls.
6

7 All of these factors warrant a conclusion that California is the proper venue for
8 SenoRx's action against the Individual Partner Defendants and that Defendants'
9 Motion to Transfer Venue of this action to New York should be denied.
10

IV. CONCLUSION

11 For the foregoing reasons, Defendants' Motion to Transfer Venue Pursuant to
12 28 U.S.C. § 1412 should be denied.
13

14 Dated: July 27, 2007

15 LAW OFFICES OF MICHAEL J. PIUZE
16
17 By: _____
18 Holly L. Hostrop
19 Attorney for Plaintiff SenoRx, Inc.
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